

JURY TRIAL, REQUIREMENTS FOR -- 12-person juries -- when required .
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Article 2, § 23 of the Arizona Constitution and A.R.S. § 21-102(A) require a jury of twelve persons whenever the defendant faces the death penalty, or thirty years or more in prison, if he is convicted. In determining whether a twelve-person jury is required, the courts "look to the possible cumulative sentences in each case and not just the possible sentence for each count or charge . . . regardless of the sentence he actually did receive." *State v. Henley*, 141 Ariz. 465, 468, 687 P.2d 1220, 1223 (1984). If a defendant is denied the right to a twelve-person jury, "the error is fundamental because it violates a state constitutional provision" and "is also harmful." *Id.*, at 469, 687 P.2d at 1224. Because the error is fundamental, there is no need for the defendant to object to an eight-person jury at the trial level, or to assert his right to a twelve-person jury. See *State v. Luque*, 171 Ariz. 198, 200, 829 P.2d 1244, 1246 (App. 1992). Fundamental error is always preserved for appellate review. Thus, if a defendant is entitled to a twelve-person jury and does not either get such a jury or make a knowing, voluntary and intelligent waiver of that right, it is always reversible error. *Henley, supra*; also see *State v. Prince*, 142 Ariz. 256, 258, 689 P.2d 515, 517 (1984).

When a defendant is entitled to a twelve-person jury but is tried by an eight-person jury, the trial court can, and should, declare a mistrial even when the defense objects. In *State v. Madison*, 114 Ariz. 221, 560 P.2d 405 (1997), the defendant was charged with seven counts. He was entitled to a twelve-person jury, but was mistakenly tried by an eight-person jury, which found him not guilty of five counts and guilty of two others. The error was discovered after the jury returned its verdicts, but before the entry of judgment and sentence. When the trial court recognized that the defendant should

have had twelve jurors, the court declared a mistrial *sua sponte* over the defense's objection and ordered a new trial on the two counts on which the defendant had previously been found guilty. On appeal, the defendant argued that he was being subjected to double jeopardy. The Arizona Supreme Court disagreed, noting that if the trial judge had not declared a mistrial, the error would have inevitably led to reversal on appeal. "By declaring a mistrial and ordering retrial with a twelve person jury even after the jury had returned a verdict, [citation omitted], the court prevented a possible reversal on appeal and corrected the error and afforded the defendant a second opportunity to defend against the charge." *Id.* at 11, 560 P.2d at 408.

If the State becomes aware during a trial with eight jurors that the defendant is entitled to twelve jurors, the prosecution can dismiss charges or withdraw allegations to reduce the defendant's sentencing exposure to less than thirty years. In *State v. Cook*, 122 Ariz. 539, 541, 596 P.2d 374, 376 (1979), after the close of the defendant's case but before the case went to the jury, defense counsel informed the trial court that the defendant was entitled to a twelve-person jury and moved for a mistrial. The trial court denied that request and the State moved to withdraw an allegation of a prior conviction, thus reducing the defendant's sentencing exposure to less than thirty years. The trial court allowed the State to withdraw the allegation and then submitted the case to the jury. The defendant was convicted and on appeal, argued that the only appropriate remedy was to declare a mistrial. The Arizona Supreme Court found that no mistrial was required, distinguishing *Madison, supra* and holding that the trial court properly exercised its discretion in allowing the State to withdraw the allegation of prior conviction. *See also State v. Hurley*, 197 Ariz. 400, 4 P.3d 455 (App. 2000). In *Hurley*,

the defendant was charged with manslaughter. Before trial, the State alleged three prior felony convictions. The trial judge asked the parties if a twelve-person jury was required because of the prior conviction allegations and noted that if the State were to withdraw one or more of those allegations, only eight jurors would be required. The prosecutor then moved to dismiss all but one of the allegations and the trial proceeded with eight jurors and two alternates. The defendant was convicted and on appeal, argued that the trial judge was biased because the judge effectively gave the State legal advice. The Court of Appeals rejected that argument, noting:

As to the issue of an eight-person jury, the trial court simply recognized the obvious fact that a twelve-person jury was required only if the prosecutor wished to pursue all of the original charges against defendant. The trial judge made it clear at the time of his comments that it was entirely up to the state whether to proceed with the original charges or to dismiss any of the allegations of prior convictions.

Id. at 405 & 25, 4 P.3d at 455 & 25. The Court of Appeals concluded that the trial judge had not shown any bias.

The Court of Appeals followed *Cook, supra*, in *State v. Thorne*, 193 Ariz. 137, 971 P.2d 184 (App. 1997). In *Thorne* the defendant faced over thirty years in prison if he received consecutive sentences on two counts. However, at a pretrial hearing the State stipulated that the sentences on those two counts would have to be concurrent because the two counts were based on a single act. The defendant received concurrent sentences, the longest of which was ten years. On appeal, he contended that because the maximum sentence could have exceeded thirty years, he was entitled to a twelve-person jury. The Court of Appeals disagreed, noting that the State was bound by its pretrial stipulation, "and the trial court impliedly agreed by empanelling an eight-person jury:"

[T]he determination of the maximum potential sentence may be made at any time prior to the submission to the jury. [Citations omitted.] Until a case is submitted to the jury, the state may amend the charges in a manner that could reduce the defendant's possible punishment. [Citation omitted.] Therefore, even though defendant's potential maximum sentence was thirty years or more when he was first charged, the potential maximum sentence was reduced in a timely manner, thereby making an eight-person jury appropriate.

Id. at 138, 971 P.2d at 185.

The trial court may not deprive a defendant of the right to a twelve-person jury merely by declaring that the defendant will not be sentenced to incarceration in excess of thirty years. In *State v. Pope*, 192 Ariz. 119, 961 P.2d 1067 (App. 1998), the defendant was charged with offenses that exposed him to a maximum of eighty-one years in prison. Before trial, the State offered to stipulate that any sentences imposed be concurrent and that any sentences imposed must total less than thirty years. The defense objected and suggested that the State dismiss some charges, but the prosecutor declined to do so. The trial court then ruled that eight jurors were sufficient, ordering that, regardless of the jury's findings, no consecutive sentences would be imposed. The eight-person jury acquitted the defendant on some charges but found him guilty on others. The court imposed concurrent sentences, the longest of which was six years. On appeal, the defendant argued that he was entitled to twelve jurors. The Court of Appeals agreed, distinguishing *Thorne, supra*:

The judge's assurance that he would not impose a sentence in excess of thirty years in the case before us is not the equivalent of the prosecutor's acknowledgment in *Thorne* that a single act underlies two charges. The judge's assurance was a forfeiture of discretion in order to limit what was authorized; the state's stipulation in *Thorne* was an acknowledgment of fact that established what was authorized. This distinction is not purely technical. In our case, notwithstanding the fact that the Defendant could not be sentenced to more than thirty years because of the judge's assurance, he was nonetheless on trial for a crime that society deems serious enough to carry a penalty in excess of thirty years. In other words, what one judge may

think about the circumstances of the crime is not the only consideration that bears on the size of the jury.

Id. at 121 ¶ 10, 961 P.2d at 1069 ¶ 10 (App. 1998). The *Pope* court held that the defendant was entitled to a new trial on the charges for which he was convicted. "

Because conviction on those charges cannot result in a penalty in excess of thirty years, he will not be entitled to a twelve-person jury on retrial. Nonetheless, reversal and retrial is required to vindicate his constitutional right." *Id.*, at ¶ 12.